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April 1, 2004

Mr. Joseph DuBray, Jr.

Director, Division of Policy, Planning and Program Development

OFCCP, Room C-3325

200 Constitution Avenue, NW

Washington, DC 20210

Re: Proposed Amendment to 41 CFR Part 60-1

Dear Mr. DuBray:

I am writing to comment on the proposed changes to OFCCP recordkeeping regulations that were published in the Federal Register on March 29, 2004. Glenn Barlett Consulting Services, LLC provides a full range of Affirmative Action and Equal Employment Opportunity professional services. Most of our clients are Federal Contractors. We prepare hundreds of Affirmative Actions Plans and assist in dozens of OFCCP Compliance Evaluations each year. I am the President of the firm and I have intimate knowledge of the Office of Federal Contract Compliance Programs (OFCCP) US Department of Labor, where I was employed as an Equal Opportunity Specialist, Quality Auditor, and Regional Director of Planning and Support. I specialized in the use of statistical analysis of personnel data to identify potential employment discrimination while I was employed by the Federal Government as well as in my current work as a consultant.

I am a member of the faculty of the Cornell University School of Industrial and Labor Relations and the Rutgers University Institute of Management and Labor Relations. I teach seminars on the use of statistical analysis to identify potential areas of employment discrimination, the preparation of Affirmative Action Plans, the Census 2000 Special Equal Employment Opportunity (EEO) File, and the Glass Ceiling.

My comments on the proposed rule changes follow.

Comparison to the Proposed UGESP Agencies Guidance

The proposed guidance published by the UGESP Agencies on March 4, 2004 states: "In order for an individual to be an applicant in the context of the Internet

and related electronic data processing technologies, the following must have occurred:

- the employer has acted to fill a particular position;
- the individual has followed the employer's standard procedures for submitting applications; and
- the individual has indicated an interest in the particular position."

Under the proposed OFCCP rule an individual would have to meet the following four criteria in order to be considered an "Internet Applicant:"

- The job seeker has submitted an expression of interest in employment through the Internet or related electronic technologies;
- the employer considers the job seeker for employment in a particular open position;
- the job seeker's expression of interest indicates the individual possesses the advertised, basic qualifications for the position; and
- the job seeker does not indicate that he or she is no longer interested in employment in the position for which the employer has considered the individual.

The definitions are similar but different on a very important point. The proposed OFCCP rule addresses "advertised, basic qualifications," while the proposed UGESP guidance does not address qualifications. There is no explanation for the differences between the proposed OFCCP rule changes and the proposed UGESP agencies' March 4, 2004 guidance. OFCCP should work with the other UGESP agencies to resolve these differences. Otherwise, the Office of Management and Budget should resolve the differences.

Creation of Two Categories of Applicants

The OFCCP acknowledges in the analysis section that the "proposed rule creates differing standards for data collection for traditional applicants versus Internet Applicants for the same job." The agency expressly solicits comments on this issue. The OFCCP provides no insight into why the agency is proposing different standards. Executive Order 11246, as amended, and Title VII of the Civil Rights Act of 1964, as amended, draw no such distinctions. Many federal contractors receive submissions of interest via the Internet and traditional means. Contractors who use both means would have to solicit race, ethnicity, and gender from individuals who do not indicate they possess the advertised, basic qualifications if the individual who sends a resume via regular mail, but not if the

individual sends the same resume via email. OFCCP should revise its proposed rule to eliminate the differing standards.

When and How Should Contractors Collect Race, Ethnicity, and Gender Information

The proposed OFCCP rule, does not directly address at what point in the selection process contractors should collect race, ethnicity, and gender information from "Internet Applicants."

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- the job seeker does not indicate that he or she is no longer interested in employment in the position for which the employer has considered the individual.

Contractors can determine whether or not individuals meet the first three of these criteria based on the individual's initial expression of interest. A determination of whether or not an individual meets these criteria will not change. Whether or not an individual meets the fourth criteria is subject to change through the selection process. Contractors could make inquiries regarding the fourth criteria and then solicit race, ethnicity, and gender from all individuals who meet all four criteria. The proposed rule would then require contractors to no longer consider individuals as applicants if they remove themselves from the selection process at any stage up to and including the offer stage. An individual is not an applicant if they turn down an offer of employment if they apply via the Internet or related electronic technologies, but is an applicant if they apply via traditional means.

The proposed OFCCP rule is silent on how contractors should solicit race, ethnicity, and gender information. The answer to Question 88 published in the March 2, 1979 Federal Register discussed visual observation and self-identification forms. The OFCCP also discussed these two approaches in the Section-by-Section Analysis that proceeded regulatory revisions published on November 13, 2000. Clearly a visual observation does not apply to individuals

applying for employment opportunities via the Internet and related electronic data processing technologies during the early steps of the selection process. In the November 13, 2000 Federal Register, the OFCCP stated that the agency "would not hold a contractor responsible for an employee or applicant's refusal to self-identify." The rule changes proposed on March 29, 2004 do not address what an employer should do if an individual applies via the Internet, declines to complete an electronic self-identification form, but subsequently is interviewed by a representative of the employer. Is the contractor then obligated to provide a paper self-identification form, do a visual identification, or do a visual identification if a paper self-identification form is not completed? I believe that a contractor has an obligation to perform a visual observation of race, ethnicity, and gender if a contractor representative has physical contact with an applicant just as they are obligated to do for employees who decline to self-identify their race, ethnicity, and gender. Otherwise, a contractor's hire data will include individuals who may not be included in the corresponding applicant flow because the individuals declined to self-identify.

Cost Burden of Complying with the Proposed Rule Changes

The OFCCP repeated verbatim the burden statement published by the UGESP agencies on March 4, 2004. The UGESP agencies claim that the move by employers to Internet and related electronic data processing technologies for receiving applicants is a cost savings. The agencies fail to acknowledge that many employers are not seeking race, ethnicity, and gender data until individuals progress to the interview stage or are determined to be minimally qualified. The UGESP agencies claim the associated record keeping costs are \$0.56 per record for manual record keeping, and \$0.11 per record for computerized record keeping. The UGESP agencies base the cost estimate on an hourly personnel clerk rate of \$14.75. The \$0.56 per record cost translates to a personnel clerk processing 26.34 records per hour or one every 2.3 minutes. The computerized estimate may begin to approach reality for those employers with expensive, sophisticated applicant tracking systems that include an electronic self-identification form that is provided for individuals to complete when they respond to a specific opening. The estimate does not calculate the cost of such a system or the cost of modifying systems that do not include such an electronic self-identification form. The costs would be greater for employers who want to add structure to their "standard procedures for submitting applications."

The UGESP agencies estimate that there are 865,962 employers subject to the proposed guidance. The overwhelming majority of these employers do not have sophisticated applicant-tracking systems. Many employers receive e-mail in

response to openings listed on their web sites or elsewhere. These employers would have to send e-mail to all individuals responding seeking race, ethnicity, and gender information. E-mail responses would then have to be matched with applications. The data then needs to be entered into a computer based tracking system, such as a spreadsheet, or a paper log. There is no way this will occur in the 2.3 minutes estimated by the UGESP agencies. A time estimate of 15 to 20 minutes per record is much more reasonable. Many employers have human resources generalists or recruiters performing these tasks. They are paid more than \$14.75 per hour. Few, if any, personnel clerks would be able to prepare job advertisements adhering to the OFCCP's definition of basic qualifications or determine whether or not individuals meet the four criteria of "Internet applicants."

The UGESP agencies failed to address the unresolved proposal by the EEOC to modify race and ethnic categories. The timing of changes of race and ethnic categories should be coordinated with changes in record keeping of applicant data so employers can make all of the changes to their applicant tracking systems at the same time.

Alternatives

The OFCCP does not discuss any alternatives that would permit employers to analyze their selection process but not be faced with costly and burdensome record keeping. One such alternative would be to permit employers to select the step in the selection process at which they seek race, ethnicity, and gender information. Many contractors currently solicit race, ethnicity, and gender at the interview stage. Employers are required to maintain all applications and records of the steps involved in the selection process. In addition to comparing hire data to applicant data, employers could be required to compare hire data to labor market data of persons with requisite skills. Employers with significant disparities between the representation rates of minorities and women in their hire data and the representation rates of minorities and women with requisite skills in the relevant labor market could be required to justify the components of their selection process. Ironically, OFCCP indicates that it will use such an approach to analyze recruitment processes that occur prior to collection of gender, race and ethnicity data. This approach would also address the reality of significant percentages of applicants declining to complete self-identification forms.

Public Hearings

The OFCCP should hold public hearings on their proposed rule changes. Employer representatives could provide testimony regarding the response rates

to electronic self-identification forms, realistic estimates of the burden that compliance with the rule changes proposed on March 29, 2004 would cause, and viable alternatives.

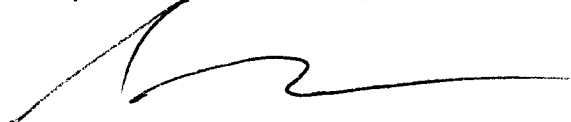
Summary

In summary, I recommend that the OFCCP do the following:

- Eliminate differences between the UGESP agencies' guidance and the OFCCP rule changes;
- Eliminate differing standards for data collection for traditional applicants versus Internet Applicants for the same job;
- Provide specific requirements for when and how contractors are obligated to seek race, ethnicity, and gender information on applicants;
- Develop realistic estimates of the burden of the record keeping that would be necessary in order to comply with the rule changes;
- Implement the changes in applicant recordkeeping at the same time as the implementation of changes in race and ethnic categories for tracking employees;
- Allow alternatives that would permit employers to analyze their selection process for potential discrimination but not be faced with costly and burdensome record keeping;
- Rename the proposed rule to "Obligation to Solicit Race, Ethnicity and Gender Data for Agency Enforcement Purposes" because the proposed rule applies to ethnicity in addition to race and gender; and
- Hold public hearings on the proposed rule changes.

I appreciate having the opportunity to comment on the proposed guidance. I hope the comments are helpful. Please contact me if there are any questions.

Respectfully submitted,



Glenn Barlett